

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:SER:VWV:RCH:GL-603682-98
SMFriedberg

date: May 26, 1998

to: Chief, Special Procedures, Virginia-West Virginia District

from: District Counsel, Virginia-West Virginia District

subject: Unfiled Returns and Priority Classification

This responds to your oral request for advice in the above-referenced case of April 10, 1998.

ISSUE

Whether the tax liabilities for years for which returns were due more than three years prior to the bankruptcy petition date and for which no returns were filed but assessments can be made following the filing of a bankruptcy petition because notices of deficiency were issued, can be classified as priority claims?

CONCLUSION

Due to the exclusion relating to years for which no returns were filed, the claims cannot be classified as priority claims.

FACTS

The facts are assumed to be:

1. The years at issue ended and the returns for those years were due more than three years prior to the bankruptcy petition date.
2. The debtor did not file returns for any of the years at issue.
3. There have been no assessments for those years.

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4. A notice of deficiency for those years was issued within three years of the due date of the return.

5. The bankruptcy case was filed prior to the Internal Revenue Service making any assessment, either during the 90 day period during which the debtor could file a petition with the Tax Court or during the 60 day period following that period.

ANALYSIS

Because the claim relates to a period that is more than three years prior to the petition date, it cannot be classified as a section 507(a)(8)(A)(i) priority claim. Also, it cannot be classified as a section 507(a)(8)(a)(ii) claim, because there has not been an assessment within 240 days of the filing of the petition.

Thus, we are limited to considering whether the liabilities can be classified under section 507(a)(8)(a)(iii).

A tax on income, . . . other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

Generally, when no returns are filed, any liabilities for those years are excepted from discharge by 11 U.S.C. § 523(a)(1)(B). And, because they are not dischargeable are the type of tax that are not included in the priority claims as defined in section 507(a)(8)(iii).

So the question boils down to whether the issuance of the notice of deficiency for those years is an act that changes the classification and for which the liabilities then can be classified as priority claims under section 507(a)(8)(iii). This cannot be read into the plain language of the Bankruptcy Code.

Unfortunately, the super-discharge under 11 U.S.C. § 1328(a) produces the anomalous result that a person who has failed to file returns for taxable years more than 3 years before filing a chapter 13 petition can obtain a discharge of that liability by

merely mentioning it in the plan whereas a claim with respect to which a return was filed and the liability is not assessed but assessable when the chapter 13 is filed would be a priority claim under 507(a)(8)(A)(iii) and could not be discharged in a Chapter 13 unless fully paid. In re Verdunn, 187 BR 996, 1000 (M.D. Fla. 1995); In re Zieg, 206 BR 974 (D. Neb. 1997) and In re Morgan, 209 BR 531 (Bankr. D. Kan. 1997).

Since no further action is required, we are closing our file.

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cc: ARC(GL)